

Supreme Court,
FILED

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No. _____

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

Richard J. Fox,

Petitioner,

v.

U.S. POSTAL SERVICE,

John E. Potter,

Postmaster General,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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August 16, 2005

QUESTION PRESENTED

Whether the affirmation by the Ninth Circuit Court of Appeals of the ruling by the U.S. District Court of Montana granting Respondent's motion for summary judgment violated the rules for summary judgment, Petitioner's Civil Service Reform Act protections, the Rehabilitation Act of 1973 and the 14th Amendment of the Constitution?

**PARTIES TO THE PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 14.1, all parties appear in the caption of the case on the cover page.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. App. A. The opinion of the District Court is unpublished. App. B. The Order of the Appellate Court denying Petitioner's Petition for Rehearing is submitted in App. C. The decision of the Equal Employment Opportunity Commission ("EEOC") appears in App. D. The Final Order of the Merit Systems Protection Board ("MSPB") appears in App. E. The MSPB administrative judge's Initial Decision of June 11, 1999, appears in App. F. The Opinion and Order of the MSPB may be found in App. G. The MSPB Administrative Judge's Initial Decision of August 24, 1998 is listed in App. H.

JURISDICTION

The Ninth Circuit Court of Appeals issued a Memorandum affirming the District Court's decision on March 23, 2005. Petitioner timely petitioned for a rehearing which was denied by the Court of Appeals on May 18, 2005. A copy of the Order Denying Rehearing appears at App. C.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). App. 67a.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The 14th Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV § 1.

Pursuant to this Court's Rule 14.1(f), the pertinent parts of other statutes, regulations and rules involved in this case, including 5 U.S.C. § 2302, 5 U.S.C. § 7513, 5 U.S.C. § 7703, 28 U.S.C. § 1254, 29 U.S.C. § 791, 42 U.S.C. § 12102, 5 C.F.R. § 752.403, Appendix to 29 C.F.R. Part 1630.2(1) and F.R.Civ.P. 56 are set forth at App., *infra*, 62a-76a.

STATEMENT OF THE CASE

This petition is a "whistle-past-the-graveyard" attempt by Petitioner to obtain even a modicum of equal treatment in this matter.

This mixed case was brought before the U.S. District Court under authority granted by 5 U.S.C. § 7703(a)(1), App. 86a, in order to review an MSPB decision after Petitioner's administrative remedies were exhausted.

On or about November 21, 1981, Appellant Richard J. Fox ("Fox") was hired by the U.S. Postal Service ("Agency") as a part-time regular employee. In 1984, Fox became a full-time Regular Distribution Clerk with the Agency. On or about March 16, 1985, Fox changed to the Maintenance Craft as a Custodial Laborer. In March 1986, Fox became an Electronic Technician ("ET") with the Agency. Almost immediately, Fox experienced a pattern and practice of disparate treatment and harassment, resulting in Fox seeking psychiatric treatment. This reprehensible treatment of Fox by management continued throughout his entire time of employment as an ET.

In December 1996, the Agency notified Fox that he would be required to attend additional training in

Norman, Oklahoma. Although Fox had a familiarity with the equipment (by both working on it and reading the course material from the Norman training site), training by the installer and a letter from his immediate supervisor stating that he did not need the training, the Agency nevertheless required Fox to attend this training, which Fox did.

On or about September 26, 1997, in a meeting between the Agency and Fox, another training session was discussed. During that meeting, Fox advised that he might not be able to immediately attend another training session due to medical problems brought on mainly by managerial harassment. As a result of this meeting, E. Gay Schroff, Manager, Human Resources, drafted a letter stating that if Fox received medical certification that he could not attend the training session at the Norman training site, he would be demoted. Subsequent to receipt of medical information from Fox's physician, the Agency sent Fox to a Fitness-for-Duty ("FFD") Examination. The Agency's physician, Dr. Drill, determined that Fox was prevented from attending training in Norman, Oklahoma, because of his hypertension and opined that "any training that needs to be done with Mr. Fox could certainly be done in a different manner with video or written instructions". App. 79a.

On or about October 28, 1997, the Agency read a letter to Fox indicating that the Agency was not disposed to providing Fox with the reasonable accommodation that was requested by the FFD physician. Instead, Fox would be downgraded from an ET, PS-09, to a Custodial Laborer, PS-03, even though, at the time, Fox was the senior ET at the Billings facility. The downgrade